

INVESTIGATION OF THE *TRIPARTITUM*'S SUBSTANTIVE  
LAW INSTITUTIONS FOR UNDISTURBED POSSESSION IN THE  
COMPARATIVE ANALYSIS OF THE ROMAN AND CANON  
LAW: FROM THE INSTITUTION OF *USUCAPIO* TO THE LEGAL  
INSTITUTION OF *PRAESCRIPTIO*

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While investigating Hungary's substantive law institutions in the late Middle Ages, first of all it is worth to make an attempt to explore their origins. Evident facts support this quest. Thus, we know that the Roman law – consequently its substantive law statutes – did not directly influence the Hungarian legal system,<sup>1</sup> but rather they streamed into the Hungarian legal life via the canon law.<sup>2</sup> István Werbőczy compiled the valid legal system of Hungary by 1514 through his legal collection called *Tripartitum*. The opinions of the competent researchers are divided on the existence and extent of Werbőczy's knowledge and education in the legal sciences, even to this very day.<sup>3</sup> We are, however, well aware that he utilized important sources from the post-classical and Middle Ages.<sup>4</sup>

The acquirement of the *ius commune* in the university education of the Middle Ages – which primarily evolved from the Bologna School – was built on two pillars. The first pillar was constituted by the legal material which was later summarized under the name of *Corpus Iuris Canonici* containing the effective ecclesiastical legal

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<sup>1</sup> FÖLDI, András – HAMZA, Gábor: *Római jog története és intézményei*. Budapest, Nemzeti Tankönyvkiadó, 2009. Nr. 480–488.

<sup>2</sup> BÓDINÉ BELIZNAI, Kinga – HORVÁTH, Attila – MEZEY, Barna – RÉVÉSZ, T. Mihály – ZLINSZKY, János: Jogfejlődés és jogtörténet. Jog, jogrendszer, jogágak a magyar jogfejlődésben. In: MEZEY, Barna (ed.): *Magyar jogtörténet*. Budapest, 2007. 19–21.

<sup>3</sup> SZILÁGYI, Csaba: Bíró és ítélet a Hármaskönyv prológusában. In: CSEHI, Zoltán – SZABÓ, István et al. (ed.): *A Hármaskönyv 5000. évfordulóján*. Budapest, Pázmány Press, 2015. 189–195.; HAMZA, Gábor (ed.): *Tanulmányok Werbőczy Istvánról. Studien über István Werbőczy*. Budapest, Professzorok Háza, 2001.

<sup>4</sup> SZILÁGYI (2015) op. cit. 192.

disciplinary order.<sup>5</sup> The second pillar was constituted by a compilation of statutes which was taught and (already by the end of the Middle Ages and the beginning of the Modern Times) printed out under the name of *Corpus Iuris Civilis*. As a matter of fact, it constituted the Roman law groundwork for the European secular law implementation.<sup>6</sup>

According to the available data, the decisive proportion of the Hungarian legal scholars attended to the law–faculty of the University of Bologna already from the 13<sup>th</sup> century.<sup>7</sup> In the course of their education, they had the opportunity to get an exhaustive knowledge in the *ius commune*, whose most part, however, they could not apply under the Hungarian circumstances. The main reason of it was that the Hungarian economical situation did not justify the application of the differentiated legal institutions. One of its witnesses was that the dogmatics of the relationship between the right of possession and the ownership rights was not worked out by the Hungarian law in the Middle Ages.<sup>8</sup> Consequently, the application of the usucapion – the original way of getting a property based on the pure fact of possession – was problematic.

The problem, however, is not recent. Already the 41, 3, 1 and followings in Digesta were concerned with this question. The civil law was aware of the legal institution of usucapion (*usucapio*), which made possible for the possessor – to avoid legal doubtfulness – to get also ownership over a given thing via the pure fact of possessing this very thing, in case if certain conditions (like the passing of time or the unperturbedness of the possession etc.) were also fulfilled. However, civil law ownership on ground–plots in the provinces could not exist – therefore the institution of usucapion could also not work. It was, however, an unequitable situation – therefore steps must have been taken that a legal institution resembling to that of the usucapion could have been applied. Application of the *praescriptio longi temporis* offered a solution. The *praescriptio*<sup>9</sup> was an extraordinary component located up front in the formula of the claim that might have complemented the *exceptio*; a demurrer that the law court must have been decided on before the substantive discussion of the relief. In the classical age, the *praescriptios* for the benefit of the defendant were uniformly called *exceptios*.<sup>10</sup>

Among these – already for the arrangement of the proprietary relations in the provincial areas – emanated the *praescriptio longi temporis*. The provincial procurator provided protection for the person who cultivated a plot in the provinces for an extended time (ten or twenty years) against the original proprietor, who did not take care of it during this duration of time. Thus, the user did not acquire ownership rights, but rather the court guaranteed him the further unharmed usage of the land in the framework

<sup>5</sup> ERDŐ, Péter: *Az egyházjog forrásai*. Budapest, Szent István Társulat, 1998. 205.

<sup>6</sup> HAMZA, Gábor: *A modern jogrendszerek tagozódása és a római jogi tradíció*. Budapest, Magyar Tudományos Akadémia, 2014. 13.

<sup>7</sup> Gábor HAMZA: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage*. Budapest, Andrassy Gyula Universität, 2002. 63–64.

<sup>8</sup> ZLINSZKY, János: A rendi Magyarország magánjoga: Dologi jog. In: MEZEY, Barna (ed.): *Magyar jogtörténet*. Budapest, Osiris, 2003. 84–89.

<sup>9</sup> Gaius Institutionum commentarii IV. 4, 130–137.

<sup>10</sup> FÖLDI–HAMZA (2009) op. cit. Nr. 591

of a litigious objection, by inhibiting the proprietor to engage in possession. By this, we may practically speak about the desuetude of the plea for the land protection. In the continuance of time, the unwritten law made also possible usucapion instead of desuetude.

Finally, the extant partial regulations of the age were unified by the codification of Justinian. In its framework he upheld the denomination *praescriptio longi temporis* and adjusted the legal institution to the regulations in the provinces, hereby enriching the procedural connotation of the expression *praescriptio* with a substantive law meaning.

Still, not this, but a very similar formula was naturalized for the *ius commune* of the Middle Ages. Emperor Constantine I (306-337) introduced a formula, through which one could get ownership rights over a certain estate via the uninterrupted possession of forty years, even without having a valid claim. The desuetude of the substantive law claims was qualified to be usucapion by Emperor Theodosius II's (408-450) general decree on desuetude. Based on the latter, Emperor Justinian (525-565) ordered that those who possessed a thing which had been acquired in good faith unperturbed for thirty or forty years, gained also ownership rights with the desuetude of the claim.<sup>11</sup> The Latin language of the Middle Ages denominated this formula as *praescriptio longissimi temporis*.<sup>12</sup>

The Roman lawsuit right – which was built on action demands concerning private legal claims – constituted part of the civil law even by the glossators and commentators of the Middle Ages, seeing that they acted by applying the *institutio-system* by Gaius (110-178). First, Donellus (1527-1588) separated the civil procedural law from the substantive law, thus the independence of the lawsuit right came true at the dawn of the Modern Age. Thus, with the usucapion/desuetude concept pair we got into the area of the *public law* (to be more exact, to the *procedural law*) from the area of the *civil* (more precisely, the *substantive*) *law* – however, the public law character of the civil lawsuit order was recognized only by the 19<sup>th</sup> century.<sup>13</sup>

The Hungarian legal system in the late Middle Ages and early Modern Times was raised on the early Hungarian judicial practice, which primarily applied the ancient clannish law in connection with the substantive law, while in the area of the procedural law it endeavored to apply the Western European (from the Hungarian point of view, explicitly novel and modern) procedural law, containing primarily canon law principles due to the effect of the mediating clerical stratum.<sup>14</sup>

The traditional canon law also used the term *praescriptio* for the usucapion.<sup>15</sup> For this, the possession – which is the factual reservation of the *permitted* things as property – is necessary. This must occur in one's own name, continuously, unintermittedly, and also in a righteous way (that is, based on a legal claim). However, the claim is not mentioned in the canon law – at best, the legal practice refers to the civil claims

<sup>11</sup> Codex Iustinianus 7, 39, 8, 1.

<sup>12</sup> FÖLDI-HAMZA (2009) op. cit. Nr. 1056–1059.

<sup>13</sup> FÖLDI-HAMZA (2009) op. cit. Nr. 672.

<sup>14</sup> STIPTA, István: Perjogok története: a magyar perjog fejlődése 1848-ig. In: MEZEY (2003) op. cit. 424.

<sup>15</sup> CIC<sup>1917</sup> can. 1508–1512. (Source: *Codex Iuris canonici*. Typis Polyglottis Vaticanis, MCMLXV)

prevalent in the given area. The regulations of the *Codex Iuris Canonici* of 1917 (which compiled the legal material of the previous centuries), however, prescribed the *good faith (bona fides)* in Canon 1512 – hence the person practicing usucapion must have believed that the thing in question was his own. The canon law valued the passing of time in a differentiated way. Thus, the duration of the usucapion concerning the goods of the Apostolic Holy See was hundred, concerning other legal personalities, thirty, while concerning natural ecclesiastical persons, ten years. The legal consequence of the *praescriptio* was that the factual status of the possession – besides certain conditions – became a *legal status* due to the mere passing of time, i.e. the peaceful and undisturbed possession of the thing originated property.<sup>16</sup>

Naturally the ecclesiastical procedural law also used the institution of the *exceptio*, the lawsuit objection. Its aim was to delay or exclude the judicial validation of the action of the claimant.<sup>17</sup> The canon law was acquainted with the objections concerning both the substantial and the procedural law.<sup>18</sup>

It is worth to look out on the presently effective ecclesiastical law regulations of the *Codex Iuris Canonici* accepted in 1983. Accordingly, desuetude and usucapion are legal institutions, through which a person may gain subjective rights<sup>19</sup> following the expiration of a given period of time. He who possesses something in good faith as his own, will be granted by the legal order with the until then missing legal basis – thus, with ownership rights.

Translation of the word *prescriptio* in the *Codex Iuris Canonici* into the Hungarian legal language provides two possibilities: the analogies „desuetude” in the lawsuit right and „usucapion” in the substantial law. The former is the way of losing substantive rights as well as acquaintance from commitments (*praescriptio extinctiva*), while the latter is the way of acquiring substantive rights (*praescriptio acquisitiva*). The desuetude of a certain right often joins to the respective usucapion for the part of an other person – therefore it is justifiable that the Latin canon law language applies a single expression on both.<sup>20</sup>

The effective canon law deploys the regulation of usucapion on the civil law with an *allusive norm*, however, in certain cases it maintains the characteristic regulation. Thus, the Codex fixes a special prescriptive as well as usucapion time regarding the rights of certain persons. This is one hundred years referring to the real estates, valuable goods as well as either personal or material claims of the Apostolic Holy See, while in point of the same goods and rights of other official ecclesiastical persons, it is thirty years.<sup>21</sup>

Thus, the Hungarian national regulation is worth to be investigated in the light of the study of the Roman and canon law, based predominantly on the *Tripartitum*

<sup>16</sup> BÁNK, József: *Kánoni jog II.* Budapest, Szent István Társulat, 1963. 380–382.

<sup>17</sup> D. 44,1,1. (Agere etiam is videtur, qui exceptione utitur; nam reus in exceptione fit actor)

<sup>18</sup> BÁNK (1963) op. cit. 494.

<sup>19</sup> CIC<sup>1983</sup> can. 197. (Source: ERDŐ, Péter (ed.): *Az Egyházi Törvénykönyv.* Budapest, Szent István Társulat, 1983.)

<sup>20</sup> ERDŐ, Péter: *Egyházjog.* Budapest, Szent István Társulat, 2003. Nr. 593–596.

<sup>21</sup> CIC<sup>1983</sup> can. 1270.

compiled by István Werbőczy. One can find the rules of *praescriptio* in two places of the legal compilation: under Title 23 of Part I apropos of the *ius regium*, and in detail under Titles 78 and 79 of Part I. These passages contain the definition of the concept and the instructions on the time durations.

According to the definition given in the *Tripartitum*, *praescriptio* is the expiration of the time that was appointed by the law with respect to the rightful holding and recovery of things. This duration expired in one hundred years with respect to the royal, forty to the ecclesiastical, thirty-two to the noble and twelve for the civilic ownership rights. Among the villagers, the desuetude contained a deadline extending only to one full year and one day.<sup>22</sup> Werbőczy referred also to the different system of regulational order concerning the ecclesiastical wealth.<sup>23</sup>

Thus, the ancient Hungarian law referred to the term *desuetude* as the passing of time. Following the expiration of this duration, the entitled could not vindicate his claimed right via a juridical way. *Usucapion*, therefore – in contrast to the rules of other ages or legal systems – did not form ownership rights, but exclusively provided a basis for a legal claim. This was called *praescriptio longae possessionis* by the contemporary Hungarian law, meaning that the possessor could only keep his possession if the owner's right to start a claim fell into desuetude. Thus, usucapion was only an objection in the lawsuit, meaning that in cases when someone litigated his own property from the actual possessor, the possessor could counter-argue with the passing of time and the unperturbed possession. Although by this, the claimant lost his legal ability against the possessor (thus the possessor could remain in his possession) – however, the possessor could only remain as possessor: he could not gain ownership.<sup>24</sup> Therefore it was in the possessors' own interest to get a clear title for his possession. Thus, in Hungary one must not have either claim or good faith (*bona fides*) – only unperturbed passing of time – for the possession.<sup>25</sup> The Hungarian law was aware of more titles of the discontinuation of the usucapion compared to the classic Roman law.<sup>26</sup>

This short article containing the definition of a sole legal institution and presenting the basic sources of the Hungarian traditional law wishes to salute Professor János Zlinszky, who was an excellent cultivator of the history of both the Roman and Hungarian law. In the hope of the resurrection we take our leave from the Professor, remembering his deep humanity and comprehensive knowledge, upon which the generation of the 21<sup>st</sup> century looks with great respect, as one of the decisive characters of the legal science's classical cultivation.

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<sup>22</sup> Trip. Part I. Title 78. § 1. 2. 4. (Source: MÁRKUS, Dezső (ed.): *Werbőczy Hármaskönyve*. Budapest, Franklin, 1897.

<sup>23</sup> Trip. Part I. Title 78. § 6.

<sup>24</sup> Planum Tabulare, Decisio 14.

<sup>25</sup> BÉLI, Gábor: *Magyar jogtörténet – Az államalapítástól 1848-ig*. Pécs, JPTE ÁJK, 1995. 23.

<sup>26</sup> ZLINSZKY, János: A rendi Magyarország magánjoga: dologi jog. In: MEZEY (2003) op. cit. 89.

